

STATE OF MICHIGAN
COURT OF APPEALS

MARJORIE KULONGOWSKI, Personal
Representative of the Estate of ANNA
MCCORMICK, Deceased,

Plaintiff- Appellant,

v

THOMAS GLENN,

Defendant- Appellee,

and

JEAN OSINSKI, JOAN NITKOWSKI, RALPH
OSINSKI, LEONARD LONG and EDNA
SBORDON,

Not Participating.

UNPUBLISHED
April 29, 1997

No. 189029
Wayne County Probate Court
LC No. No. 94-529740

MARJORIE KULONGOWSKI, Personal
Representative of the Estate of ANNA
MCCORMICK, Deceased,

Plaintiff- Appellant,

v

THOMAS GLENN,

Defendant- Appellee.

No. 192868
Wayne County Probate Court
LC No. No. 94-529740

Before: Holbrook, Jr., P.J., and White and A. T. Davis*, JJ.

PER CURIAM.

These consolidated appeals arise from one action brought by plaintiff, as personal representative of the estate of Anna McCormick (decedent), to determine title to four National Bank of Detroit accounts owned jointly by decedent and defendant. In Docket No. 189029, plaintiff appeals as of right from the trial court's order of judgment awarding the accounts to defendant. In Docket No. 192868, plaintiff appeals as of right from the trial court's order awarding costs and attorney fees to defendant as a result of plaintiff's rejection of defendant's offer of judgment. We affirm.

I

In Docket No. 189029, plaintiff presents two arguments on appeal. Plaintiff's first argues that the trial court erred in not entering judgment for plaintiff based on the jury's answers to special questions indicating that a presumption of undue influence had been established. We disagree.

Where a verdict in a civil case is inconsistent and contradictory, it will be set aside and a new trial granted. *Payton v City of Detroit*, 211 Mich App 375, 397; 536 NW2d 233 (1995). Every attempt will be made to harmonize a jury's verdicts; only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside. *Clark v Seagrave Fire Apparatus, Inc.*, 170 Mich App 147, 153; 427 NW2d 913 (1988). Where a conflict occurs between special questions and a general verdict, the general verdict must yield. *Pelly v Peterbilt Motors*, 133 Mich App 664, 668; 350 NW2d 787 (1984).

We conclude the trial court did not err in refusing to set aside the general verdict based on the jury's answers to specific questions. The general and special verdicts in this case are not necessarily inconsistent. It is true that a presumption of undue influence attaches when the evidence establishes (1) the existence of a confidential or fiduciary relationship between the decedent and the fiduciary; (2) the fiduciary or interest which he represents benefits from the transaction and (3) the fiduciary had an opportunity to influence the decedent's decision in that transaction. *In Re Leone Estate*, 168 Mich App 321, 324; 423 NW2d 652 (1988). But it is equally true that the ultimate burden of proof in undue influence cases remains with the proponent throughout the trial, *Kar v Hogan*, 399 Mich 529, 538; 251 NW2d 77 (1976), and that if evidence is introduced to rebut the presumption, the presumption becomes a permissible, but not mandatory, inference. *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985).

Defendant presented sufficient evidence to rebut the presumption of undue influence raised by the presence of the underlying factors. Defendant and two witnesses testified that the decedent was not harmed, threatened, flattered, defrauded or taken advantage of by defendant. Defendant received no money for the chores he did for the decedent. She chose defendant as the relative she wanted to visit her after her husband was placed in a nursing home. Defendant had no knowledge of decedent's

* Circuit judge, sitting on the Court of Appeals by assignment.

financial affairs before being placed on the four NBD accounts. Defendant left the checkbook in decedent's possession until after she was hospitalized, and did not take either the checkbook or money from the accounts until it became necessary to do so to pay for her medical care and household expenses.

The evidence also showed that decedent was fully aware of the survivorship nature of the NBD accounts. She had held the same accounts jointly with her husband for many years. The custodian of her NBD bank records testified that the decedent would have been fully informed at the time of the transfer that defendant would have survivorship rights in the accounts. Decedent's two friends who accompanied her to NBD to make the transfer testified that she was alert and appeared to understand everything she was told about the accounts. Because the evidence adduced at trial was sufficient to rebut the presumption of undue influence raised by the special findings, we cannot say that the special findings and the general verdict for defendant cannot be reconciled. In other words, it appears the jury found that the elements of the presumption were present, but undue influence had not actually occurred. This conclusion is supported by the jury's answer to question number four, and the court's record colloquy with the jury in response to jury questions during deliberation.¹

B

Plaintiff's second argument in Docket No. 189029 is that the trial court erred in not granting plaintiff's motion for a new trial or for judgment notwithstanding the verdict. We disagree.

Plaintiff's argument on this issue mirrors the argument on the first issue: that the jury's special findings conclusively established that defendant exercised undue influence and therefore mandated a verdict for plaintiff. But defendant presented sufficient evidence to rebut the presumption of undue influence. Reviewing the testimony and all legitimate inferences that may be drawn in the light most favorable to defendant, *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995), we find that reasonable jurors honestly could have reached different conclusions. Further, we are unable to say that the verdict was against the great weight of the evidence.

II

In Docket No. 192868, plaintiff's only argument on appeal is that the trial court erred in awarding attorney fees to defendant. We cannot agree.

Where both an offer of judgment and a mediation evaluation have been rejected, MCR 2.405(E) provides that the cost provisions of the rule under which the later rejection occurred control. Plaintiff rejected defendant's offer of judgment after defendant rejected the mediation award. Therefore, the cost provisions of MCR 2.405 control.

Plaintiff argues that the trial court acted against the interest of justice in awarding attorney fees to defendant because defendant changed his testimony. We are unable to say that the trial court abused its discretion in concluding that the interest of justice did not require that the court refuse to award attorney fees. MCR 2.405(D)(3).

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ Alton T. Davis

¹ It appears that the real inconsistency is not within the jury verdict form, but comes from the court's instruction to the jury that it must find undue influence if all three components of the presumption were established. As defendant points out on appeal, this instruction appears to be incorrect, see use notes SJI2d 170.45, and, in any event, the permissive nature of the ultimate inference of undue influence was correctly clarified by the court.